Supreme Court, U.S.
FILED
DEC 8 - 2014
OFFICE OF THE CLERK

No. 14-103

IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

CATHERINE STEEGE
Counsel of Record
BARRY LEVENSTAM
MELISSA M. HINDS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
csteege@jenner.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether 11 U.S.C. § 330(a) grants a bankruptcy judge discretion to award compensation for the defense of a fee application.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 9

I. Section 330 Allows Bankruptcy Courts Sufficient Discretion To Award Compensation For The Successful Defense Of Fee Applications 9

A. Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications Is Necessary To The Administration Of A Bankruptcy Case 11

B. Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications Is Necessary To Ensure That A Chapter 7 Trustee's Professionals' Compensation Is Based On "The Customary Compensation Charged By Comparably Skilled Practitioners" In Non-Bankruptcy Cases 14

C. Section 330(a)(4)(A) Does Not Expressly Exclude Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications 15

II. A Rule That Forbids Bankruptcy Courts From Compensating Professionals For Defending Fee Applications May Discourage Competent Professionals From Representing Chapter 7 Trustees, Thereby Harming The Bankruptcy System 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Asarco LLC v. Baker Botts, L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. (In re Asarco LLC), Case No. 2:11-cv-290, 2012 WL 3526610 (S.D. Tex. Aug. 8. 2012) 13, 14

Boyd v. Engman (In re Engman II), 404 B.R. 467 (W.D. Mich. 2009) 7, 10, 13

Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975) 15

In re Ambotiene, 316 B.R. 25 (Bankr. E.D.N.Y. 2004) 6

In re Amr Mohsen, 506 B.R. 96 (N.D. Cal. 2013) 17, 18

In re Asarco LLC, No. 05–21207, 2011 WL 2974957 (Bankr. S.D. Tex. July 20, 2011) 10

In re Byrd, No. 04-35620, 2011 WL 589907 (Bankr. D. Md. Feb. 10, 2011) 6, 18

In re Siskin, No. 02–10373, 2011 WL 4899868 (Bankr. S.D.N.Y. Oct. 13, 2011) 2

In re Smith, 317 F.3d 918 (9th Cir. 2002) 7, 8, 10, 14

In re UNR Industries, Inc.,
986 F.2d 207 (7th Cir. 1993) 3

In re Worldwide Direct Inc.,
334 B.R. 108 (D. Del. 2005) 5, 16, 17

Jacobowitz v. Double Seven Corp.,
378 F.2d 405 (9th Cir. 1967) 3

Johnson v. Mississippi,
606 F.2d 635 (5th Cir. 1979) 15

Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge),
220 B.R. 386 (D. Idaho 1998) 4

Ortho Pharmaceutical Corp. v. Smith,
959 F.2d 936 (Fed. Cir. 1992) 9

Pentech Pharmaceuticals, Inc. v. Par Pharmaceutical, Inc.,
597 F. Supp. 2d 758 (N.D. Ill. 2009) 9

Prandini v. National Tea Co.,
585 F.2d 47 (3d Cir. 1978) 15

Russello v. United States,
464 U.S. 16 (1983) 8, 15

STATUTES

11 U.S.C. § 327(a) 12

11 U.S.C. § 330(a)(1) 5

11 U.S.C. § 330(a)(1)(A) 6, 9

11 U.S.C. § 330(a)(1)(B) 6

11 U.S.C. § 330(a)(3)(C) 4, 7, 10, 11, 16

11 U.S.C. § 330(a)(3)(F) 4, 7, 8, 10, 11, 14, 15

11 U.S.C. § 330(a)(4)(A) 8, 10, 11, 15, 16

11 U.S.C. § 330(a)(4)(A)(i) 16

11 U.S.C. § 330(a)(4)(A)(ii) 16

11 U.S.C. § 503(b)(2) 7, 13

11 U.S.C. § 704(a) 7, 12

11 U.S.C. § 704(a)(1) 1, 2, 12

11 U.S.C. § 704(a)(4) 2, 12

11 U.S.C. § 704(a)(5) 2, 12

11 U.S.C. § 704(a)(6) 2, 12

11 U.S.C. § 704(a)(8) 2, 12

28 U.S.C. § 586(a)(1) 1

OTHER AUTHORITIES

Fed. R. Bankr. P. 2016(a) 5

H.R. Rep. No. 95-595 (1977) 3, 7, 13, 14

Committee on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992) 5

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Bankruptcy Trustees ("NABT") submits its brief in support of Petitioners, and respectfully urges the Court to conclude that bankruptcy courts have the discretion to award compensation for the defense of fee applications.

NABT is a non-profit professional association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country, and to promote the effectiveness of the bankruptcy system as a whole. There are approximately 1,100 chapter 7 bankruptcy trustees currently receiving new cases, and the vast majority of them are NABT members. In forty-eight states and the federal territories, the United States Trustee has the responsibility of appointing chapter 7 panel trustees pursuant to 28 U.S.C. § 586(a)(1).[2] A trustee is appointed in every chapter 7 case. The trustee has primary responsibility for all aspects of chapter 7 case administration.

Chapter 7 trustees, as the fiduciaries responsible for the administration of all chapter 7 bankruptcy cases, are charged with preserving and promoting the system's integrity by, among other things, efficiently administering their bankruptcy cases. 11

---

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] In Alabama and North Carolina, chapter 7 trustees are appointed by bankruptcy administrators.

U.S.C. § 704(a)(1). Many of a chapter 7 trustee's duties require the assistance of attorneys, accountants, or other professionals. *Id.* at §§ 704(a)(1), (4), (5), (6), (8). Thus chapter 7 trustees have an interest in ensuring that the most capable professionals are willing to work on bankruptcy cases.

The Fifth Circuit's decision that bankruptcy courts lack the discretion to award compensation from the estate to professionals for the successful defense of a fee application imposes what effectively amounts to a surcharge or tax on bankruptcy work and may cause competent professionals to decline bankruptcy engagements. The NABT submits that this bankruptcy "tax" will be felt most in chapter 7 cases where professional fees are relatively small and the likelihood of unwarranted fee objections greatest. It is not uncommon for disgruntled *pro se* debtors to mount a barrage of litigation against their case trustee, including challenging the award of compensation to the trustee's attorneys, accountants, and other professionals. *See, e.g.*, *In re Siskin*, No. 02–10373, 2011 WL 4899868, at *7 (Bankr. S.D.N.Y. Oct. 13, 2011) (overruling debtor's 37-page fee objection "laced throughout with *ad hominem* attacks directed at the Trustee and his professionals"). When total compensation in chapter 7 cases is often under $10,000, incurring even a $1,000 fee to defend against an attack on the professional's fees can result in a significant reduction of the professional's compensation. The NABT's position, therefore, is that the Bankruptcy Code grants bankruptcy courts the discretion to award compensation from estate assets for fees incurred successfully defending a fee

application when the bankruptcy court deems it appropriate to allow such fees.

SUMMARY OF THE ARGUMENT

When Congress enacted the modern Bankruptcy Code, it recognized the importance of providing fair compensation to the professionals who represent bankruptcy trustees. Congress understood that competent bankruptcy specialists would not remain in the field "if required to accept fees in all of their cases that are consistently lower than fees they would receive elsewhere." H.R. Rep. No. 95-595, at 330 (1977); *see also In re UNR Indus., Inc.*, 986 F.2d 207, 209 (7th Cir. 1993). Thus, Congress legislated a change to the policy that existed under the prior Bankruptcy Act of requiring bankruptcy attorneys to "be paid ... appreciably less than [they] could command for similar services" outside of bankruptcy. *Jacobowitz v. Double Seven Corp.*, 378 F.2d 405, 407 (9th Cir. 1967).

Instead of subordinating professionals' fees to the "economy of the estate," Congress made changes to the Bankruptcy Code to ensure that there would be parity between the fees professionals could earn in bankruptcy cases and those they could earn elsewhere. *See* H.R. Rep. No. 95-595, at 330 (1977). The Bankruptcy Code accomplished this congressional directive in two ways: (1) by expressly commanding bankruptcy courts to consider whether the requested compensation "is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title"; and (2) by directing that services that are "necessary to the administration" of a case or that

are "rendered toward the completion of" a case are beneficial to the estate and thus compensable. 11 U.S.C. §§ 330(a)(3)(C), (F).

Congress achieved its objective of attracting highly skilled professionals to the field of bankruptcy administration. According to statistics compiled by the Office of the United States Trustee, between 2011 and 2013, chapter 7 trustees closed the administration of 182,262 chapter 7 cases, distributing approximately $8.3 billion to creditors.[3] As these statistics demonstrate, chapter 7 trustees and the professionals they employ play an important role in the nation's economy, returning significant dollars to creditors and helping ease the financial impact of business and consumer failures. "[T]he federal government's interest in maintaining the bankruptcy system is one of the highest order and must, therefore, be regarded as compelling." *Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge)*, 220 B.R. 386, 392 (D. Idaho 1998).

While the total dollars paid to creditors over this period is very large, the mean fee paid to trustee's counsel per case over this same time period has consistently been quite small—approximately $7,000 per case.[4] For other chapter 7 professionals, the

---

[3] http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2011.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/CH7CY2012.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2013.pdf.

[4] *Id.*

highest reported mean fee per case is $32,939 for calendar year 2012.[5] Thus, the attorneys and accountants who make the chapter 7 bankruptcy system work earn very modest fees relative to the amounts they return to creditors.

When it comes to getting paid these modest fees, "[b]ankruptcy professionals operate in an environment that is virtually unheard of in the legal profession as a whole." Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992). The Bankruptcy Code requires the submission of detailed bills that are provided to all parties in interest. *See* 11 U.S.C. § 330(a)(1); Fed. R. Bankr. P. 2016(a). Thus, those who are adverse to a trustee are entitled both to review the trustee's detailed legal bills and to object to payment. *Id.* Outside of bankruptcy, rarely does an opponent have anything to say about his adversary's legal fees.

Forcing bankruptcy professionals to shoulder the financial burden of defending their fee applications "would be to provide an unhealthy incentive for persons opposed to professional fees to mount spurious objections as a means of extracting fee reductions, rather than because the work done for the estate was genuinely not for the benefit of the estate." *In re Worldwide Direct Inc.*, 334 B.R. 108, 112 (D. Del. 2005). This perverse incentive arising out of the Fifth Circuit's ban on compensation for fee defense work would affect chapter 7 trustees disproportionally because they are the ones who most often must deal with litigious *pro se* debtors

---

[5] http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2012.pdf.

and other disgruntled parties in the course of the administration of a bankruptcy estate. As a result, a chapter 7 trustee's professionals are more likely to become the targets of meritless fee objections or objections interposed for tactical reasons. *See, e.g.*, *In re Byrd*, No. 04-35620, 2011 WL 589907, at *5, 8-9 (Bankr. D. Md. Feb. 10, 2011); *In re Ambotiene*, 316 B.R. 25, 39-40 (Bankr. E.D.N.Y. 2004).

Moreover, the modest size of the legal fee that most professionals earn in a typical chapter 7 case further exacerbates the impact of the Fifth Circuit rule on professionals working for chapter 7 trustees. A professional earning a mean fee of $7,000, for example, stands to lose ten percent of her fee if she is required to spend just $700 defending her fee application. Since most objections require the professional to prepare a written response and attend at least one court hearing, a $700 fee is likely understated. This type of surcharge may cause highly skilled bankruptcy professionals to decline representations in precisely the types of difficult cases where their skills are most needed.

The Code does not require this result. Section 330 of the Bankruptcy Code grants bankruptcy courts broad discretion to award "reasonable compensation for actual, necessary services" rendered by a chapter 7 trustee's professionals as well as "reimbursement for actual, necessary expenses." 11 U.S.C. §§ 330(a)(1)(A), (B). Section 330(a)(3) establishes guideposts that bankruptcy courts must consider when determining the amount of the fee award, including whether the services provided were necessary to the administration of a

bankruptcy case and whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases. 11 U.S.C. §§ 330(a)(3)(C), (F). As the Ninth Circuit held in *In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002), compensating professionals for the successful defense of a fee application fits squarely within these guideposts.

As a preliminary matter, the services incurred by a professional in her successful defense of a fee application *are* necessary to the administration of the bankruptcy case. 11 U.S.C. § 330(a)(3)(C). This is so for two principal reasons. *First*, a chapter 7 trustee relies upon her professionals to advise and assist the trustee with respect to the trustee's statutorily imposed duties. *See* 11 U.S.C. § 704(a). As Congress recognized when it enacted the modern Bankruptcy Code, it would be very difficult for a chapter 7 trustee to retain qualified and competent professionals if such professionals were concerned that they would be forced to absorb the cost of defending meritless objections to fee applications. H.R. Rep. No. 95-595, at 330 (1977). The assurance that services incurred in connection with the defense of a fee application, if otherwise appropriate, will be compensable therefore advances the administration of chapter 7 cases generally, as well as each case individually. *See Boyd v. Engman (In re Engman II)*, 404 B.R. 467, 483 (W.D. Mich. 2009); *accord In re Smith*, 317 F.3d at 927-30. *Second*, a chapter 7 bankruptcy case cannot be closed until the bankruptcy court finally determines the allowed administrative expenses—including professional fees awarded under Section 330. 11 U.S.C. § 503(b)(2). A

professional's successful defense of her fee application is therefore a necessary part of the final administration and closing of any chapter 7 case.

Section 330(a)(3)(F), which instructs bankruptcy courts to consider whether the award of compensation is "reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title," also supports compensating fees incurred in connection with the successful defense of a fee application. *Id.* Not compensating a chapter 7 trustee's professionals for the time and expenses associated with the successful defense of a fee application will necessarily dilute their overall compensation below that of "comparably skilled practitioners" in non-bankruptcy cases who are not required to bear the unreimbursable costs and expenses of defending a fee application. *In re Smith*, 317 F.3d at 929.

Finally, and critically, Section 330 contains two expressly enumerated instances in which a court should not award compensation: (i) where services are unnecessarily duplicative; and (ii) where services are not reasonably likely to benefit the debtor's estate or are not necessary to the administration of the estate. 11 U.S.C. § 330(a)(4)(A). Had Congress intended to except the successful defense of a fee application from what is within the bankruptcy court's discretion to award as "reasonable compensation," it could and would have done so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotations omitted)).

Accordingly, because the Bankruptcy Code allows it, and sound public policy supports it, the NABT urges this Court to hold that bankruptcy courts have the discretion to award compensation for the successful defense of a fee application from estate assets.

ARGUMENT

I. Section 330 Allows Bankruptcy Courts Sufficient Discretion To Award Compensation For The Successful Defense Of Fee Applications.

Section 330 of the Bankruptcy Code affords bankruptcy courts broad discretion to award "reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person." 11 U.S.C. § 330(a)(1)(A). In other contexts, a statutory direction that courts apply a standard based on what is "reasonable" is viewed as granting the courts broad discretion. *See, e.g.*, *Ortho Pharm. Corp. v. Smith*, 959 F.2d 936, 945 (Fed. Cir. 1992) (injunctive relief for patent infringement); *Pentech Pharms., Inc. v. Par Pharm., Inc.*, 597 F Supp. 2d 758, 787-88 (N.D. Ill. 2009) (interest calculations for contract damages).

That conclusion is further supported by the statutory direction that in setting compensation, bankruptcy courts must consider the "nature, the extent, and the value" of a professional's services, taking into account all "relevant factors," including certain guideposts that are set forth in Sections 330(a)(3)(A)-(F). Of particular relevance to this issue, Section 330(a)(3)(C) directs bankruptcy courts to consider "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title." *Id.* Section 330(a)(3)(F) directs bankruptcy courts to consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." *Id.* Finally, Section 330 prohibits bankruptcy courts from awarding compensation in only two narrow circumstances—when there is an "unnecessary duplication of services" or when the services are not "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A).

With this clear statutory framework in mind, the majority of lower courts to address the issue have routinely—and correctly—held that the plain text of Section 330 provides bankruptcy courts with sufficient discretion to award compensation for the successful defense of a fee application. *See e.g. In re Smith*, 317 F.3d at 929; *Boyd*, 404 B.R. at 482–83; *see also In re Asarco LLC*, No. 05–21207, 2011 WL 2974957, at *38 n.109 (Bankr. S.D. Tex. July 20, 2011) (collecting cases). The majority of courts have reached this result for three primary reasons: *first*,

fees incurred in connection with the successful defense of a fee application are "necessary to the administration" of a bankruptcy case (11 U.S.C. § 330(a)(3)(C)); *second*, compensation of fees incurred in connection with the successful defense of a fee application is necessary to ensure that a chapter 7 trustee's professionals receive "customary compensation charged by comparably skilled practitioners" in non-bankruptcy cases (11 U.S.C. § 330(a)(3)(F)); and *third*, Section 330, which expressly prohibits compensation in certain instances, imposes no prohibition on the reimbursement of fees incurred in the successful defense of a fee application. (*See* 11 U.S.C. § 330(a)(4)(A)).

A. Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications Is Necessary To The Administration Of A Bankruptcy Case.

Compensation of fees incurred in connection with the successful defense of fee applications benefits the administration of bankruptcy cases generally, as it removes what would otherwise be an impediment to a chapter 7 trustee's ability to retain competent and qualified counsel. It also benefits the administration of each specific bankruptcy case, as the resolution of professional fees is a necessary component of resolving and completing the administration of a bankruptcy case. Accordingly, Section 330(a)(3)(C), which directs bankruptcy courts to take into account whether the services performed were necessary to the administration of the bankruptcy case, supports

the allowance of fees incurred in connection with the successful defense of a fee application.

Section 327(a) of the Bankruptcy Code authorizes a chapter 7 trustee to employ attorneys and other professional persons to represent and assist the trustee in carrying out the trustee's duties. 11 U.S.C. § 327(a). A chapter 7 trustee's duties, enumerated in Section 704(a) of the Bankruptcy Code, are numerous, and often require the trustee to engage experienced attorneys and professionals to, *inter alia*, prosecute avoidance and recovery actions for the benefit of the estate, investigate the financial affairs of the debtor, review and object to claims, file objections to a debtor's discharge, and prepare and file financial and tax reports. *See* 11 U.S.C. §§ 704(a)(1), (4), (5), (6), (8). As Congress recognized when it enacted Section 330 of the modern Bankruptcy Code, if professionals employed by a trustee are not compensated reasonably for the reasonable services they provide:

> [A]ttorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. [If] required to accept fees in all of their [bankruptcy] cases that are consistently lower than fees they could receive elsewhere,

> [attorneys] will not remain in the bankruptcy field.

H.R. Rep. No. 95-595, at 330 (1977). The bankruptcy court's discretion to award compensation to a chapter 7 trustee's professionals, including compensation in connection with the successful defense of fee applications, is critical to the chapter 7 trustee's ability to retain competent and qualified counsel, and therefore to the overall administration of bankruptcy cases generally, and to each individual case as well. As the bankruptcy court in *Boyd* explained, "the underlying purpose of Section 330(a) and other federal statutes allowing for attorney fees show that [time spent successfully defending fee applications] is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." 404 B.R. at 483.

Awarding professionals compensation for litigation over the defense of fee applications also benefits the administration of a bankruptcy case because such litigation is necessary to determine the amount of "compensation and reimbursement *awarded* under section 330(a)" as administrative expenses. 11 U.S.C. § 503(b)(2) (emphasis supplied). Because the successful defense of a fee application results in the determination of the ultimate award of fees, it necessarily benefits the administration of the chapter 7 case: "actions in resolving outstanding fee issues clearly benefits the estate. ... the bankruptcy case cannot be put to bed until these matters are resolved." *Asarco LLC v. Baker Botts, L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., (In re Asarco LLC)*, Case No. 2:11-cv-290, 2012 WL

3526610, at * 17 (S.D. Tex. Aug. 8. 2012); *see also In re Smith*, 317 F.3d at 929 (services incurred in defense of fee application "were necessary for the administration of the case and provided a benefit to the debtor's estate in determining the amount of the administrative fees that the estate owed ...").

B. Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications Is Necessary To Ensure That A Chapter 7 Trustee's Professionals' Compensation Is Based On "The Customary Compensation Charged By Comparably Skilled Practitioners" In Non-Bankruptcy Cases.

Section 330(a)(3)(F) also supports compensation of fees incurred in connection with the successful defense of fee applications. Section 330(a)(3)(F) directs bankruptcy courts to consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." *Id.* If a chapter 7 trustee's professionals were not compensated for their successful defense of fee applications, the effect would be to dilute their compensation below that of "comparably skilled practitioners" in non-bankruptcy cases. *See In re Smith*, 317 F.3d at 929. Indeed, this is just the problem that Congress attempted to resolve when it enacted Section 330(a). *See* H.R. Rep. No. 95-595, at 330 (1977). It logically follows, then, that permitting bankruptcy courts the discretion to award fees incurred in connection with the successful defense of

fee applications furthers Section 330(a)(3)(F)'s directive that fees be reasonable when measured against those charged by comparably skilled practitioners.

Moreover, in other contexts where federal courts award fees, federal courts have the discretion to allow compensation for fees incurred defending a fee application. *See, e.g.*, *Johnson v. Mississippi*, 606 F.2d 635, 637-38 (5th Cir. 1979) (civil rights litigation); *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 52-53 (3d Cir. 1978) (Title VII litigation); *Hairston v. R & R Apartments*, 510 F.2d 1090, 1092-93 (7th Cir. 1975) (Fair Housing Act litigation). This too supports the conclusion that allowing such compensation is necessary to ensure "parity" with non-bankruptcy professionals.

C. Section 330(a)(4)(A) Does Not Expressly Exclude Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications.

Finally, Section 330(a)(4)(A)'s exclusion of certain services from compensability indicates that Congress knew how to place express limitations on categories of compensation, and chose not to except the successful defense of a fee application from what is within the bankruptcy court's discretion to award as "reasonable compensation" under Section 330(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (internal quotations omitted).

Congress specifically prohibited bankruptcy courts from awarding compensation for "(i) unnecessary duplication of services" and for "(ii) services that were not—(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A)(i),(ii). Had Congress intended to prohibit all compensation for defending a fee application, it would have included a subpart III to the statute banning compensation for defending an objection to a fee application. Instead it included provisions making it clear that the administrative tasks necessary to the administration of a case and necessary to close a case—such as prosecuting final fee applications—are compensable. 11 U.S.C. §§ 330(a)(3)(C), (4)(A).

II. A Rule That Forbids Bankruptcy Courts From Compensating Professionals For Defending Fee Applications May Discourage Competent Professionals From Representing Chapter 7 Trustees, Thereby Harming The Bankruptcy System.

The Fifth Circuit's unnecessary ban on compensation for fee defense work has two perverse results that impact chapter 7 trustees and their professionals in a disproportionate manner.

First, "requiring counsel who has successfully defended a fee claim to bear the costs of that defense" is precisely the same as cutting counsel's rate or denying compensation for other hours devoted to the matter. *In re Worldwide Direct Inc.*, 334 B.R. at 112. "The economic effect is precisely contrary to the ... instruction that bankruptcy professionals are to

stand on an equal footing with their non-bankruptcy counterparts." *Id.* In chapter 7 cases, where the average fee paid to counsel is $7,000, the impact of that surcharge can be disproportionally high.[6]

Second, the absolute ban on compensation for fee defense work creates "an unhealthy incentive for persons opposed to professional fees to mount spurious objections as a means of extracting fee reductions, rather than because the work done for the estate was genuinely not for the benefit of the estate." *In re Worldwide Direct Inc.*, 334 B.R. at 112. This unhealthy incentive is exacerbated in chapter 7 cases where *pro se* disgruntled debtors often wage litigation campaigns against chapter 7 trustees and their professionals who are doing their jobs.

Reported cases provide illustrative examples. In 2005, for example, Amr Mohsen, a convicted felon serving time for perjury, obstruction of justice, and witness tampering, filed a chapter 11 bankruptcy case while serving a 17-year sentence for his crimes. *In re Amr Mohsen*, 506 B.R. 96, 100 (N.D. Cal. 2013). The bankruptcy court converted his case to one under chapter 7 resulting in the appointment of a chapter 7 trustee. During her administration of the chapter 7 estate, the chapter 7 trustee took a number of actions that Mr. Mohsen opposed, including piercing the corporate veil and seizing assets from

---

[6] http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2011.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/CH7CY2012.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2013.pdf.

three entities Mr. Mohsen controlled. *Id.* at 100-01. When the trustee petitioned for leave to pay her counsel, Mr. Mohsen objected to her attorney's fee petition and appealed that objection. *Id.* at 101-03. As a result, counsel had to submit two briefs in opposition to the objection in the bankruptcy court and to brief the subsequent appeal. *Id.* at 102.

Similarly, *In re Byrd* demonstrates the difficulties trustees face when unwitting debtors are placed into an involuntary chapter 7 bankruptcy by their creditors. Starting with the initial order for relief, the Byrds continuously objected to motions and withheld information to subvert the administration of their involuntary chapter 7 case. 2011 WL 589907, at *1-2. The Byrds' relentless efforts to undermine the trustee's work turned the case into a "long and tortuous" nine year affair. *Id.* at *1. The Byrds made one last objection to the trustee's final report and request for compensation, forcing the trustee to defend his fees during two hearings at which the debtors failed to appear. *Id.* The court overruled the Byrds' objection and approved the trustee's compensation request. *Id.* at *11.

Denying compensation for defending fee applications in cases like *In re Mohsen* and *In re Byrd* would create a significant disincentive for professionals to represent chapter 7 trustees in the most difficult of cases where skilled counsel is most necessary to ensure the integrity of the bankruptcy system. The end result of driving the most competent of professionals out of the system may be that chapter 7 bankruptcy cases, which currently return

on average $2.7 billion to creditors each year, will be less successful and creditors and the nation's economy will suffer.[7] Congress intended the opposite result when it enacted Section 330 of the Bankruptcy Code. The Court should reverse the Fifth Circuit's decision.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Bankruptcy Trustees requests that the judgment of the court of appeals be reversed.

December 8, 2014 Respectfully submitted,

CATHERINE STEEGE
Counsel of Record
BARRY LEVENSTAM
MELISSA M. HINDS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
csteege@jenner.com

Counsel for *Amicus Curiae*
National Association of Bankruptcy Trustees

---

[7] http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2011.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/CH7CY2012.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2013.pdf.